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IN THE

Supreme Court of the United States

October Term, 1994

F. SCHUMACHER & CO.,

Petitioner,

v.

ALVORD-POLK, INC., *et al.*

Respondents.

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

BRIEF OF STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. INTEREST OF THE STATE OF FLORIDA AS AMICUS CURIAE 2

III. SUMMARY OF ARGUMENT 3

IV. ARGUMENT

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

The Third Circuit's Decision is Wholly Consistent with this Court's Holdings in *Monsanto, Masushita,* and *Kodak*. 4

V. CONCLUSION 11

TABLE OF AUTHORITIES

Cases *Page*

Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 3rd Cir. (1994) 5, 6, 7

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. (1986) 10

Eastman Kodak Co. v. Image Technical Services, Inc., __ U.S. __, 112 S.Ct. 2072 (1992) 3, 4, 9, 10

Marin County Bd. of Realtors v. Palsson, 130 Cal. Rptr. 1, 549 P. 2d 833 (Calif. 1976) 2

Matsushita Electric Industrial Co. v. Zenith Radio, 475 U.S. 574; 106 S.Ct. 1348 (1986) 3, 4, 8, 9, 10

Monsanto Company v. Spray-Rite Service Corporation, 465 U.S. 752; 104 S.Ct. 1464 (1984) 3, 4, 5, 8

People v. North Avenue Furniture & Appliance, 645 P.2d 1291 (Colo. 1982) 2

Pittsburgh Plate Glass Co. v. Paine & Nixon Co., 234 N.W. 453 (Minn. 1931) 2

Statutes

Chapter 542, *Florida Statutes* 2

Section 542.21, *Florida Statutes* 2

Section 542.22(2), *Florida Statutes* 2

15 U.S.C. Section 1 4

15 U.S.C. Section 15C 2

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I.
INTRODUCTION

Because the Petition for Writ of Certiorari filed in this cause by F. Schumacher & Co. threatens to undermine the abilities of the State of Florida, as well as other states, to effectively prosecute vertical antitrust conspiracies, the State of Florida hereby submits this brief in support of Respondents' Brief in Opposition to Petition for a Writ of Certiorari.

II.
INTEREST OF THE STATE OF FLORIDA AS AMICUS CURIAE

The Attorney General of the State of Florida is the chief legal officer of the State. As such, he is responsible for the enforcement of state antitrust laws within Florida.[1] Specifically, Florida's antitrust statute gives the Attorney General the authority to bring civil antitrust actions in the name of the state, as *parens patriae* on behalf of natural persons residing in the state, to recover treble damages sustained by reason of any violation of the state antitrust laws.[2] Moreover, the Florida Attorney General has the authority to seek civil penalties in any action brought under state antitrust laws.[3] State antitrust laws are generally construed to be consistent with federal court decisions interpreting corresponding federal antitrust laws.[4]

Additionally, the Attorney General of the State of Florida, as well as all state attorneys general, are imbued under federal law with the authority to bring a federal civil treble damages antitrust action in the name of the State as *parens patriae* on behalf of that state's natural persons.[5]

The Attorney General of Florida has for more than a decade actively utilized his statutory authority to the fullest bringing both state and federal antitrust actions and conducting numerous investigations. Several of the Florida Attorney General's cases, both past and current,

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1 Chapter 542, *Florida Statutes.*

2 Section 542.22(2), *Florida Statutes.*

3 Chapter 542.21, *Florida Statutes.*

4 *See, e.g., People v. North Avenue Furniture & Appliance,* 645 P.2d 1291 (Colo. 1982); *Marin County Bd. of Realtors v. Palsson,* 130 Cal. Rptr. 1, 549 P. 2d 833 (Calif. 1976); *Pittsburgh Plate Glass Co. v. Paine & Nixon Co.,* 234 N.W. 453 (Minn. 1931).

5 15 U.S.C. Sec. 15C.

involve vertical antitrust conspiracies. Accordingly, Florida has a continuing substantial interest in the application of state and federal antitrust law in a manner consistent with this Court's previous holdings. Florida is therefore opposed to any departure from settled antitrust principles which improperly shifts burdens of proof and discourages aggressive enforcement of the antitrust laws. Consequently, because the Petition for Writ of Certiorari filed by F. Schumacher & Co. in this cause seeks to obtain just such an unwarranted departure, the Attorney General of Florida respectfully requests that this Court decline to issue the writ sought.

III.
SUMMARY OF ARGUMENT

Contrary to Petitioner's assertion, the Third Circuit's opinion does not contravene this Court's decision in *Monsanto Company v. Spray-Rite Service Corporation,* 465 U.S. 752; 104 S.Ct. 1464 (1984). The Third Circuit did not conclude, as Petitioner contends, that evidence of pretextual excuses by a manufacturer for sales policy changes, without more, will permit a jury to infer the existence of a conspiracy between the manufacturer and its retailers. Rather, the Third Circuit, properly viewing all of the facts, evidence, and inferences in a light most favorable to the non-moving party, concluded that the strong evidence of coercive action made over time by the retailers through their trade association along with Petitioner's clear acquiescence in these demands was sufficient to meet the summary judgment standard set forth by this Court for antitrust cases in *Matsushita Electric Industrial Co. v. Zenith Radio,* 475 U.S. 574; 106 S.Ct. 1348 (1986); and *Eastman Kodak Company v. Image Technical Services, Inc.,* __ U.S. __; 112 S.Ct. 2072 (1992).

The Court correctly considered *all* of the evidence and, pursuant to *Matsushita* and *Kodak*, properly concluded that it was reasonable to infer a conspiracy from all of the evidence presented by plaintiffs, not just the evidence of pretextual excuses, and that summary judgment was therefore improper.

IV.
ARGUMENT

REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT ISSUE

The Third Circuit's Decision is Wholly Consistent with this Court's Holdings in *Monsanto*, *Masushita*, and *Kodak*.

In addition to the reasons set forth in the Respondents' Brief in Opposition as to why the Writ of Certiorari should not issue, which are fully supported by the State of Florida, there is one additional reason not to issue the writ. Not only does the Third Circuit's holding below not contravene the Supreme Court precedent established in *Monsanto*, but, by holding as it did, the Third Circuit properly applied the summary judgment standard this Court has established for use in antitrust cases.

* * * *

Petitioner argues that this Court should accept certiorari review of this cause because the Third Circuit's decision below conflicts with the statutory requirement of concerted action in Section 1 of the Sherman Act, 15 U.S.C. Section 1, and directly contravenes this Court's interpretation of that statute in *Monsanto Company v. Spray-Rite Service*

Corporation, 465 U.S. 752; 104 S.Ct. 1464 (1984) (Petition at pp. 12-14).

In *Monsanto,* this Court held that complaints from distributors *alone* were not sufficient to create an inference of concerted action:

> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently ...[T]he antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective. [Citations omitted.]

Monsanto, 465 U.S. at 764.

Petitioner attempts to manufacture a basis upon which this Court will accept this case for certiorari review by contending that the Third Circuit's decision below contravenes this Court's holding in *Monsanto.* In making this argument, Petitioner looks only to the evidence adduced below regarding pretext and contends that, standing alone, such evidence was not sufficient for the Third Circuit to warrant a reversal of summary judgment.

However, as Respondents note in their Brief in Opposition, Petitioner's argument is based upon a mischaracterization of the Third Circuit's holding. The Third Circuit did not hold that evidence of pretext, without more, will permit a jury to infer the existence of a conspiracy. Even a cursory review of the opinion below demonstrates that the court, in reaching its decision, clearly took into account the additional evidence adduced by plaintiffs and set forth in detail in the court's opinion. *See, Alvord-Polk, Inc. v. F. Schumacher & Co.,*

37 F.3d 996, 1001-1006 (3rd Cir. 1994). Such evidence included a pattern of conduct, dating back to the late 1970's, undertaken by the National Decorating Products Association (NDPA) and its members, to coerce members not to deal with 800-number dealers and to encourage manufacturers to "level the playing field" between 800-number dealers and conventional dealers. *Alvord-Polk,* 37 F.3d at 1002-04. A consent decree between the Federal Trade Commission and the NDPA, prohibiting certain unlawful activity, did not dampen the NDPA's efforts against 800-number dealers. *Alvord-Polk,* 37 F.3d at 1003-04. In fact, the Third Circuit states that the sentiment against 800-number dealers only escalated after the consent decree was entered. *Alvord-Polk,* 37 F.3d at 1004. Numerous letters were published in the trade association's newsletters urging action against 800-number dealers. And, direct evidence was adduced that several manufacturers heard these complaints and reacted to them, with one newsletter editorial noting the sudden development of the industry of mechanisms to protect coventional retailers from 800-number dealers pirating their business, e.g. the development of bar coding kits on sample pattern books. *Alvord-Polk,* 37 F.3d at 1004.

Within this context, the Third Circuit concluded that Schumacher, too, had heard and reacted to the retail pressure to do something about 800-number dealers. *Alvord-Polk,* 37 F.3d at 1004. The evidence showed that, in 1988, as other manufacturers were undertaking the changes such as those described above, Schumacher announced a drop shipment surcharge on wallcovering deliveries directly to consumers, an action which would have the obvious effect of increasing 800-number dealers' costs. *Alvord-Polk,* 37 F.3d at 1004. Substantial direct evidence was adduced, such as Schumacher's management committee minutes and draft press releases, that showed that Schumacher took this action to signal to conventional retailers that it was trying to help them. *Alvord-Polk,* 37 F.3d at 1004. Although

Schumacher contended that the surcharge was, in part, intended to recoup increased costs of drop shipment, Schumacher apparently could not demonstrate how it determined the amount of the surcharge imposed. *Alvord-Polk,* 37 F.3d at 1004. What followed was reaction by the trade in NDPA newsletters and at an industry convention to the effect that the conventional retailers concerns were beginning to be heard, but that more was needed. *Alvord-Polk,* 37 F.3d at 1004. Subsequently, soon after an NDPA meeting, Schumacher documents indicate that Schumacher was prepared to undertake yet "another anti-pirate move." *Alvord-Polk,* 37 F.3d at 1004. The new strategy eventually announced by Schumacher was to institute a local trading policy which prohibited 800 dealers from selling Schumacher products outside of their "local trading area." *Alvord-Polk,* 37 F.3d at 1004. The NDPA executive vice president and chief executive officer sent a letter to Schumacher expressing the NDPA's appreciation for Schumacher's actions. *Alvord-Polk,* 37 F.3d at 1005.

While these activities were taking place, the facts related by the Third Circuit show that manufacturers were also discussing the 800-number dealers among themselves at Wallcovering Manufacturers' Association meetings and at conventions sponsored by a chain conventional retailer. *Alvord-Polk,* 37 F.3d at 1005. The result was that other manufacturers reacted to 800-number dealers in ways similar to Schumacher, with two eventually imposing drop shipment surcharges. *Alvord-Polk,* 37 F.3d at 1006.

This was the evidence described by the Court below and taken in a light most favorable to the nonmoving party, as is required in the review of any summary judgment. Based upon this evidence, taken as a whole, the Third Circuit concluded that:

> [V]iewing the evidence [of the 7% drop shipment surcharge taken without using mathematical calculations or consulting with anyone regarding costs] *in conjunction with the press releases and the retailer pressure on FSC, it is not an implausible conclusion that FSC may have imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not.*

Alvord-Polk, 37 F.3d at 1012-13. (Emphasis supplied).

The strong evidence of coercive demands of action made by the retailers through their trade association coupled with Schumacher's clear acquiescence to these demands as demonstrated by its own documents are the additional facts are the "something more" referred to in *Monsanto,* 465 U.S. at 763, and *Matsushita,* 475 U.S. at 588, which properly allowed the Third Circuit below to conclude that summary judgment in favor of the defendants was not appropriate.

Moreover, far from contravening Supreme Court precedent, the Third Circuit has properly applied it. This Court has made it clear that such evidence, as adduced below, is more than sufficient to overcome a summary judgment challenge.

In *Matsushita,* this Court stated:

> To survive a motion for summary judgment or for directed verdict, a plaintiff seeking damages for a violation of section 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. [*Monsanto*] 465 U.S., at 764, 104 S.Ct. at 1471. Respondents in this case, in other words, must show that the

> inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents. See *Cities Service, supra,* 391 U.S., at 280, 88 S.Ct., at 1588.

Matsushita, 475 U.S. at 588; 106 S.Ct. at 1356-7.

Matsushita makes it clear that to successfully meet the challenge of a summary judgment motion, the party opposing the motion need only show that the evidence adduced "tend[ing] to exclude the possibility" that the alleged conspirators acted independently be "reasonable" when viewed in light of competing inferences of independent action. What the Court meant by "reasonable" was later demonstrated in *Eastman Kodak Co. v. Image Technical Services, Inc.,* __ U.S. __; 112 S.Ct. 2072, 2083 (1992):

> The Court's requirement in *Matsushita* that the plaintiffs' claim make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. The Court did not hold that if the moving party enunciates *any* economic theory supporting its behavior,regardless of its accuracy in reflecting the actual market, it is entitled to summary judgment. *Matsushita* demands only that *the nonmoving party's inferences be reasonable in order to reach the jury, a requirement which as not invented, but merely articulated, in that decision.*

(Emphasis supplied). The footnote to this passage in *Kodak* is worth special note as it reminds us of the well-established principle that "summary judgment will not lie...if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Kodak,* 112

S.Ct. at 2083, n. 14, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248; 106 S.Ct. 2505, 2510 (1986).

In the instant case, it is the Petitioner who is in contravention of Supreme Court precedent, because it's argument simply ignores the standard for summary judgment in antitrust cases as set forth in *Matsushita* and *Kodak*. The Third Circuit's review properly concluded that the evidence adduced by the plaintiffs was "reasonable", i.e. was not, as the Third Circuit noted "implausible", in the face of competing inferences of independent action in that it tended to exclude the possibility that the Petitioner acted independently. Moreover, and most importantly, *Kodak* instructs that simply because the Petitioner has offered some economic justification for its actions in implementing the drop shipment surcharge, even though there is no apparent support for this argument in the evidence adduced below, does not mean that it is entitled to summary judgment. "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach a jury." *Kodak,* 112 S.Ct. at 2083. The Third Circuit properly concluded that the inferences from *all* of the evidence, not just the evidence of pretext, established by the plaintiffs below were reasonable and, consequently, that summary judgment was not appropriate.

Accordingly, far from being in contravention of this Court's decisions, the Third Circuit's opinion is clearly and consistently applied those decisions to reach the proper conclusion, given *all* of the facts before it below.

V.
CONCLUSION

For the foregoing reasons, Schumacher's Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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